Supreme Court, U.S.
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88- NO. 1748

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

JACOB TASHER, M.D.

Petitioner

versus

ST. TAMMANY PARISH HOSPITAL, ET ALS,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must the means selected by the medical staff of a public hospital to police the quality of staff performance conform to the requirements of *Loudermill* and accord prior due process notice and a hearing before deprivation of staff privileges in all circumstances.

2. Are the professional judgments of a medical committee passing upon the professional qualifications of staff physicians free from scrutiny by courts in federal civil rights litigation without violating last term's decision in *Patrick v. Burget*.

LIST OF PARTIES

Counsel of record for Petitioner certifies that the following listed parties have an interest in the outcome of this case.

Jacob Tasher, M.D.

Patricia M. Tasher

Maya H. Tasher, a minor

Avraham A. Tasher, a minor

Aryeh R. Tasher, a minor

St. Tammany Parish Hospital Service District #1, Covington, Louisiana

The Executive Committee of the Medical Staff of St. Tammany Parish Hospital, Covington, Louisiana

Dr. Francis R. Rodwig

Dr. Ludwig Heintz

Dr. Ronald Lewis

Dr. Hulon Lott, Jr.

Dr. Craig Parker

Dr. George Riser

Dr. B. Steele Rolston

Dr. Margaret Strong

Dr. William Terrall

Dr. James Bradford

Dr. Adrian Cairns

Dr. Robert Capitelli

Dr. Ralph Millet

Dr. Frank Robinson

Dr. Andrew J. Kreller, III

Louisiana Medical Mutual Insurance Company

Insurance Corporation of America

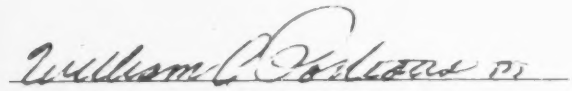
Mr. William A. Porteous, III, attorney

Mr. Lucas Giordano, attorney

Mr. Peter Dazzio, attorney

Mr. Stewart Niles, attorney

Mr. Lawrence E. Larmann, attorney



WILLIAM A. PORTEOUS, III

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JACOB TASHER, M.D.

Petitioner

versus

ST. TAMMANY PARISH HOSPITAL, ET ALS,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jacob Tasher, M D., Petitioner, hereby petitions the Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on December 1, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals, which is reproduced in Appendix D commencing at page A-22, is not reported.

The Order of the Court of Appeals denying a Petition for Panel Rehearing is reproduced in Appendix F commencing at page A-44. The Ruling on the Application of Plaintiff for a Temporary Restraining Order, dated March 13, 1987 is reproduced as Appendix A commencing on page A-1. The Order and Reasons of the District Court for Grant of Summary Judgment entered February 10, 1988 is reproduced in Appendix B commencing at page A-10. The judgment of the District Court entered February 12, 1988, is reproduced in Appendix C commencing at page A-20. The Petition for Panel Rehearing by the United States Court of Appeals for the Fifth Circuit is reporduced in Appendix E commencing at page A-32.

JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the Fifth Circuit was entered December 1, 1988. (Appendix D). An application for rehearing was denied on January 26, 1989. (Appendix F). This court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. 1983 provides in pertinent part:

> Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

On February 27, 1987, Dr. Jacob Tasher was summarily suspended from the staff of the St. Tammany Parish Hospital, a Louisiana public hospital, without a presuspension hearing.

The summary suspension grew out of an internal investigation by the hospital. In July, 1986, a Committee was appointed by the Executive Committee of the medical staff to review the otolaryngology admissions (ear, nose and throat admissions), surgical procedures and hospital complications with respect to that service. The investigation proceeded from July, 1986 through the end of February, 1987 for a period of nearly eight months. Dr. Tasher did not know and was not advised that his professional work at St. Tammany Hospital was under scrutiny for eight months. On February 18, 1987, that Committee reported after studying Dr. Tasher's admissions from 1982 through July, 1986.

A month prior to his summary suspension, Dr. Tasher's staff privileges were extended by a Credentials Committee of the hospital; members of this committee also served on the committee which was then investigating his professional performance.

On February 27, 1987, when summarily suspended with no prior hearing, Dr. Tasher was advised of his right to appeal wherein he would be required to show that the adverse decision of the Committee "lacked any factual basis or that such basis or any action based thereon was either arbitrary, unreasonable or capricious."

Dr. Tasher appealed the decision of the committee without confidence in the fairness of the appellate process at the hospital. After several hearings Dr. Tasher abandoned this post suspension hearing process.

The doctor was not accorded a presuspension hearing as required by the by-laws of the medical staff in normal situations. He was summarily suspended under a special article providing that summary suspension might be effectuated "whenever action must be taken immediately in the best interest of patient care in the Hospital . . ." At the time of the summary suspension Dr. Tasher had no patients in the hospital and none scheduled for admission.

In his civil rights Section 1983 complaint against the hospital and physicians participating in the summary suspension, Dr. Tasher sought a restoration of privileges, a temporary restraining order and a permanent injunction as well as damages. On March 13, 1987, the trial court ruled on the application of Dr. Tasher for a temporary restraining order. Findings of the trial court are at Appendix B herein. The trial judge reviewed the by-laws and noted that summary suspension might occur only when action needed to be taken immediately in the best interest of patient care in the hospital. The trial judge noted the Fifth Circuit case of *Northeast Georgia Radiological Assoc. v. Tidwell*, 670 F.2d 507, 511 and quoted at that point, "Medical staff privileges embody such a valuable property interest that notice and hearing should be held prior to its termination or withdrawal, absent some extraordinary situation where a valid government or medical interest is at stake." (Appendix A-5). Based upon *Poe v. Charlotte Memorial Hospital*, 374 F.Supp. 1302 (W.D.N.C. 1974), the trial court felt this requirement amounted to a requirement of emergency.

On September 8, 1987, before discovery began, the defendants filed a Motion to Dismiss for Failure to State a Claim or in the Alternative a Motion for Summary Judgment contending that the actions of the defendants were in compliance with the By-Laws of St. Tammany Parish Hospital, that their actions met the requisites of procedural due process and violated no constitutionally protected rights of Dr. Tasher. In the alternative they contended that there was no genuine issue of material fact and produced a copy of the transcript of the hearings on the hospital appeal of the summary suspension, the report of the original investigating committee, the report of a hospital hearing on the appeal of the summary suspension.

The Complainant opposed this motion and supported the opposition with a statement of undisputed and disputed material facts, an affidavit of Dr. Tasher annexing a response of his to the numerous findings of the investigating committee and expert reports evaluating his work and the work of the investigation committee, the ruling on the temporary restraining order, and various portions of the by-laws. The trial court decided not to hold a hearing on the motion to dismiss and/or for summary judgment and entered an order granting dismissal on October 16, 1987 and followed this with written reasons on February 10, 1988. (Appendix B).

This matter was then appealed to the United States Court of Appeals for the Fifth Circuit on March 9, 1988. The Fifth Circuit affirmed. The panel opinion concluded that no presuspension hearing was required where a claimed emergency was involved, and substantial post suspension hearing processes were in place. A balancing of social versus private interests dictated that Dr. Tasher received ample process. The panel held that emergency as a condition precedent to dispensing with a presuspension hearing is not a matter for a court to examine because of the deference

which courts accord conclusions of physicians with respect to matters of medical staffing.

Petitioner sought rehearing in the Court of Appeals for the Fifth Circuit contending that he had an absolute right to some form of presuspension hearing under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) and that the deference relied upon by the panel effectively deprived petitioner of constitutional claims: scrutiny of the findings of physicians conducting peer review are not deferentially protected on the basis of *Patrick v. Burget*, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988).

A rehearing in the Court of Appeals for the Fifth Circuit was denied January 26, 1989.

REASONS FOR GRANTING THE WRIT

The medical profession is engaged in a process of self-scrutiny through review panels and peer review committees. The public is entitled to competent medical services. The individual doctor who is being scrutinized has spent years being educated and trained. In practice he may have built an outstanding reputation. A doctor who has undergone scrutiny and been found professionally lacking will be seriously affected. His ability to practice his profession will be curbed; his reputation among patients and peers will be damaged. The public interest requires that review panels and peer review committees operate with fairness. Undoubtedly, the majority of physicians reviewing their collegues are animated by fairness and professionalism. However, abuses of the peer review process can and do occur. Reviewing physicians may act with professional jealousies, rivalries, competitive interests and envy in their judgments about their peers. When these judgments involve physicians on the staff of public hospitals and their privileges state action is involved.

Petitioner takes the position that he has a due process right to some form of presuspension hearing in all situations involving suspension from the staff of a public hospital. The Circuits have followed the Supreme Court in according that right as an absolute right. However, the Fifth Circuit in the case of this physician has not recognized the right to some form of presuspension notice and hearing. Emergency was used as a justification for the dispensing with a presuspension hearing and the Fifth Circuit, because of a deference to doctors in their judgment calls, refused to pass on whether or not an emergency was involved. This judicial thinking or judicial abstention effectively curtails a doctor's abilities to open to judicial scrutiny the processes of fellow doctors in contravention to last term's decision in *Patrick v. Burget*, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988).

I. A Physician at a Public Hospital is Entitled to a Due Process Hearing *Prior* to Summary Suspension of Staff Privileges.

A physician's staff privileges at a public hospital are a valuable property right. *Northeast Georgia Radiological Association v. Tidwell*, 670 F.2d 507, 511 (5th Cir. 1982).

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) requires "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Ibid* at 542 and 105 S.Ct. at 1493 citing *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (emphasis in original). *Loudermill* was followed by *Brock v. Roadway Express, Inc.*, 107 S.Ct. 1740, 95 L.Ed.2d 239 (1987) wherein it was held that the

> "The cases reflect that the constitutional requirement of a meaningful opportunity

> to respond before a temporary deprivation may take effect entails, at a minimum, the right to be informed not only of the nature of the charges but also of the substance of the relevant supporting evidence.
>
> 107 S.Ct. at 1749.

The Petitioner in this case was summarily suspended from St. Tammany Parish Hospital after an eight month investigation of which he knew nothing. He was suspended when he had no patients in the hospital and none scheduled for admission.

Due process and professional courtesy and concern required at the very least that the Petitioner be told about the investigation and that he be given an opportunity to explain his position. For a doctor summary suspension is devastating. He must forever acknowledge it and seek to explain it to licensing boards, hospitals where staff privileges are sought and insurers. A doctor who has had a summary suspension has great difficulty with future licensing, staff privileges and insurance.

In the case of Dr. Tasher, presuspension notice and an opportunity to be heard were vital. A *Loudermill* hearing might have been "the only meaningful opportunity to invoke the discretion of the decision maker." *Loudermill, supra* at 543, 105 S.Ct. at 1494. At least the hospital would have been "alerted to the existence of disputes about facts and arguments about cause and effect." *Id.* at 543-44, n.8, 105 S.Ct. at 1494 n. 8 (quoting *Goss v. Lopez*, 419 U.S. 565, 583-84, 95 S.Ct. 729, 741, 42 L.Ed.2d 725 (1975)).

The summary suspension was in the nature of a preliminary administrative decision. As such it caused harm which

could not be rectified by post-suspension appeals. This is the reason for the requirement of presuspension notice and opportunity for a hearing. *Matthews v. Eldridge*, 424 U.S. 319, 330-31, 96 S.Ct. 893, 900-01, 47 L.Ed.2d 18 (1976).

II. Some Form of Pre-Suspension Notice and An Opportunity to be Heard is An Absolute Due Process Requirement; The Circuits Follow this Rule; Confusion Now Exists in the Jurisprudence of the Fifth Circuit.

On the basis of *Loudermill* and *Brock*, Dr. Jacob Tasher contends that he has an absolute right to some form of presuspension hearing. The Circuits have recognized this right in absolute terms. However, confusion now exists in the Fifth Circuit.

Before action can be taken which adversely affects a person's property rights such as employment the First, Second, Third, Fourth, Seventh, Ninth and Tenth circuits require some form of presuspension notice and an opportunity to be heard. This hearing need not be a full adversarial hearing. A balancing of interests as to the requirements will suffice. However, some form of notice and an opportunity to be heard prior to adverse governmental action is required. *Feliciano-Angulo v. Rivera Cruz*, 858 F.2d 40, 42, 43-44 (1st Cir. 1988); *Doyle v. Secretary of Health & Human Services*, 848 F.2d 296, 301-02 (1st Cir. 1988); *Narumanchi v. Board of Trustees of Connecticut State University*, 850 F.2d 70, 72 (2nd Cir. 1988); *Richardson v. Felix*, 857 F.2d 505, 507-511 (3rd Cir. 1988); *Copeland v. Philadelphia Police Department*, 840 F.2d 1139, 1144-45 (3rd Cir. 1988); *Morten v. Beyer*, 822 F.2d 364, 367-71 (3rd Cir. 1987); *Crocker v. Flunana County Board of Public Welfare*, 859 F.2d 14, 15, 16-17 (4th Cir. 1988); *Davis v. Pak*; 856 F.2d 648, 651 (4th Cir. 1988); *Varandani v. Bowen*, 824 F.2d 307, 310-11 (4th Cir. 1987); *Phares v. Gustafson*,

856 F.2d 1003, 1006 (7th Cir. 1988); *Birdsell v. Litchfield Board of Fire and Police Commissioners*, 854 F.2d 204, 206, 208 (7th Cir. 1988); *Cassim v. Bowen*, 824 F.2d 791, 796-99 (9th Cir. 1987); *Koerpel v. Heckler*, 797 F.2d 858, 860, 868-69 (10th Cir. 1986).

In this case, the Fifth Circuit has abandoned the requirement of some form of presuspension notice and hearing. That is a departure from prior Fifth Circuit jurisprudence and from the jurisprudence prevailing in the other circuits set forth above and from *Loudermill*. In the *Tasher* case, no argument has been made that any form of presuspension notice or hearing was afforded. The panel opinion of Judge Jolly does not address in any way whether or not there was a presuspension notice and an opportunity for explanation. No where in its panel opinion does the Fifth Circuit address a *Loudermill, Brock* or *Boddie* issue. The court relies entirely on an analysis based upon *Matthews v. Eldridge*, 424 U.S. 319, 334-335, 96 S.Ct. 893, 902-03 (1976).

In prior jurisprudence involving doctors, the Fifth Circuit recognized *Loudermill* due process rights. *Darlak v. Bobear*, 814 F.2d 1055 (5th Cir. 1987); *Ramirez v. Ahn*, 843 F.2d 864 (5th Cir. 1988). The *Darlak* court required a hearing before deprivation of a significant property interest such as medical privileges. *Darlak, supra* 1052. The court noted that Dr. Darlak and those who suspended him met prior to the suspension and discussed it. *Darlak, supra* at 1062, n.8, 1057, 1063. The other Fifth Circuit case, *Ramirez v. Ahn, supra* at 866-68, concluded that Dr. Ramirez was given advance notice of initial hearings against him. In fact there were three hearings, one before suspension and two following. However, when faced with Dr. Tasher's case of a blatant violation of *Loudermill's* requirements, the Fifth Circuit has failed to recognize *Loudermill* in any regard. In the case, *sub judice* there was no presuspension notice or hearing

and no one has contended that indeed there was. In *Tasher*, the Fifth Circuit has abandoned the *Loudermill* requirement. At a very minimum the Court should grant certiorari and direct that the Fifth Circuit consider the Court's opinion in *Loudermill.*

III. Courts Must Examine and Not Defer To the Judgments of Medical Authorities Relative to Medical Competency.

In earlier jurisprudence, the Fifth Circuit noted that a physician could not be suspended without a hearing in the absence of some extraordinary circumstances where a valid government or medical interest might be at stake. *Tidwell, supra* at 511. The Fifth Circuit assumed that in the judgment of those who summarily suspended Dr. Tasher, that an extraordiany medical interest was at stake, namely some form of emergency. See, Appendix A-28. The panel opinion then deferred to the judgment of the doctors contending that the review by the courts of medical necessity is limited. See, Appendix A-28 to A-29. This followed from *Sosa v. Board of Managers of the Valverde Memorial Hospital*, 437 F.2d 173, 177 (5th Cir. 1971). Review of hospital privileges, peer review and administrative agency review of the work of doctors is a matter of increasing concern to the public and to the medical profession. A deference to medical judgments, however, cannot be a shield protecting doctors from bias, jealousy, envy or anti-competitive practices.

In *Patrick*, the Court had occasion to pass on the issue of deference to peer review by a state court. The language of the Court was follows:

> "Moreover, the Oregon courts have indicated that even if they were to provide judicial review of the hospital peer-review proceed-

> ings, the review would be of a very limited nature. The Oregon Supreme Court, in its most recent decision addressing this matter, stated that a court 'should (not) decide the merits of plaintiff's dismissal' and that '(i)t would be unwise for a court to do more than to make sure that some sort of reasonable procedure was afforded and that there was evidence from which it could be found that plaintiff's conduct posed a threat to patient care.' *Straube v. Emanuel Lutheran Charity Board, supra*, 287 Or., at 384, 600 P.2d, at 386. This kind of review would fail to satisfy the state action doctrine's requirement of active supervision. Under the standard suggested by the Oregon Supreme Court, a state court would not review the merits of a privilege termination decision to determine whether it accorded with state regulatory policy. Such constricted review does not convert the action of a private party in terminating a physician's privileges into the action of the State for purposes of the state action doctrine."
>
> *Patrick v. Burget, supra* at 1665.

If the constricted review outlined above is inadequate to qualify as state action; then *a fortiori* the very limited review envisioned by the Fifth Circuit on the basis of *Sosa* cannot qualify as judicial action. In essence, the Fifth Circuit abstained from deciding upon a doctrine of deference and this amounted to a denial to Dr. Tasher of the judicial review which any citizen is entitled to expect. Whether or not an emergency existed, such as would justify the absence of a *Loudermill* hearing, is a proper issue for judicial inquiry.

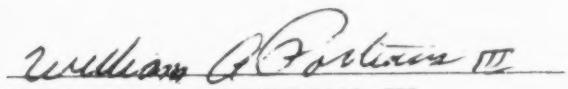
In *Patrick v. Burgent, supra*, the court sanctioned a full review of the conduct of doctors in passing upon the qualifications of a competitor in order to determine whether anti-trust violations took place. Violations of a doctor's civil rights are at issue in *Tasher*. Judicial deference to the work of doctors in passing upon staff privileges should not be a curtain for avoiding inquiry into violations of constitutional rights. In the Court's view, such deference cannot shield violations of economic rights with respect to anti-trust. Similarly, such judicial deference should not shield inquiry with regard to civil rights violations.

As peer review continues in the medical profession, there will undoubtedly be instances where the peer review process is utilized by the unscrupulous animated by jealousy, envy, spite or anti-competitive activity. It is important to the medical profession that judicial deference not become a shield for proscribed activity.

CONCLUSION

For the various reasons set forth above, this petition for certiorari should be granted.

Respectfully submitted,



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APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 87-1139
SECTION "K"

JACOB TASHER, M.D.

VERSUS

ST. TAMMANY PARISH HOSPITAL, ET AL

RULING ON APPLICATION OF PLAINTIFF
FOR TEMPORARY RESTRAINING ORDER
HEARD ON MARCH 13, 1987

BEFORE: THE HONORABLE GEORGE ARCENEAUX, JR.
UNITED STATES DISTRICT JUDGE

New Orleans, Louisiana.

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PROCEEDINGS

THE COURT: Okay, gentlemen. I'm prepared to rule. I don't know how cogently I can assemble these various notes and scrawls that I've tried to put together.

We have two contentions before us, and let me say going in that I'm not going to recite the facts. They are contained in the complaint, and have been very cogently explained by counsel for the mover. There are two contentions advanced in support of the application for a temporary restraining order, the first being that the medical staff of the hospital had no authority to remove the plaintiff, and that that power was granted to, and vested exclusively in, the board of commissioners of the hospital; and, secondly, that, even if that power were so vested in the staff of the hospital, that the action in this instance denied the plaintiff procedural due process, and that he was not accorded a hearing before he was removed or suspended.

Dealing with the first claim, clearly the defendant board of commissioners is an agency of the state, having been created pursuant to the authority contained in Act 180 of the 1984 Louisiana Legislature. That same act, in Section 3, defines the powers of a board of commissioners, and includes at subsection 3 of that section the power to make, amend, and repeal, and promulgate, enforce rules, regulations, resolutions, guidelines and organizational modifications concerning the conduct of health care facilities in order to insure proper and reliable operation of such facilities. At Section 10 it appears, rather, subsection 10 of that Section 3 appears the power to approve the medical staff and its by-laws, suspend these by-laws at any time and for any length of time, and to require the rewriting of all or part of such by-laws. And at paragraph 17 of that Section 17 appears a specific power to delegate to the commission's

officers, appointees, and employees all of the authority of the commission.

In addition, the statute, at Section 7, specifies that each commission must appoint a medical staff. Among the duties which the statute imposes on the medical staff is the requirement that it—and this appears at subparagraph 4—propose rules and regulations for the conduct of the medical staff for commission approval. The commission has adopted by-laws pursuant to its authorizing statute, and the essential provisions of those by-laws generally parallel the statutory provisions. See the plaintiff's Exhibit D.

Specifically included in those by-laws at Article 6 is the requirement that the commission appoint a medical staff, and that the medical staff propose rules and regulations for the conduct of the medical staff to be approved by the commission. This, the staff has done. And the by-laws, rules and regulations of the medical and dental staff, St. Tammany Parish Hospital, Covington, Louisiana, appearing as plaintiff Exhibit E, have been approved by the commission after being adopted by the medical staff. These rules include provisions for summary suspension under which the action complained of by the plaintiff was taken.

The Court finds that the executive committee of the medical staff has the authority to summarily suspend a staff physician, such authority having been delegated to it by specific authority to do so as contained in Section 317 of the district's enabling and authorizing statute.

The Court also believes that the power given to the medical staff in Section 7(b) (4) of the statute to propose rules and regulations for the conduct of the medical staff for commission approval fortifies this conclusion, particularly

when, as here, the commission has approved the provision so submitted which deals specifically with summary suspension of staff members under specific circumstances. I suppose, succinctly put, what the Court has said is that the combination of the approval power and the delegatory power given to the commission in the light of the by-law and rule provision adopted by the medical staff vests the medical staff with the initial power to suspend.

Now, turning to the second issue, the Court has to bear in mind that in evaluating this claim I must find that, in order for a temporary restraining order to issue, first, that there is a substantial likelihood that the moving party will prevail on the merits; second, the public interest would not be disserved by the temporary restraining order; and, third, the threatened injury to the moving party out-weighs the injuries the opposing party would suffer from the temporary restraining order. This has been the rule in the Fifth Circuit for many, many years. And, specifically, is clearly set forth in *Norman Bridge Drug Company v. Banner*, 529 F.2d 822, a 1978 Fifth Circuit case.

In addition, the probability of ultimate success on the merits must be balanced with the consequences of judicial intervention at a preliminary stage of the action. *Meis v. Sanitas Corporation*, 511 F.2d 655, another Fifth Circuit case, an early case, a 1975 case. Both of these cases are still good law, and announce the principles upon which the Court is going to rely.

The by-laws, as the Court has found, give the committee, the executive committee of the hospital staff the authority to summarily suspend whenever action must be taken immediately in the best interest of patient care in the hospital. In effect, it seems to this Court that the terms, "whenever action must be taken immediately in the best interest of

patient care in the hospital," states the essential rule set forth in *Northeast Georgia Radiological Association v. Tidwell*, 670 F.2d 507, a 1982 Fifth Circuit Case, where at page 511 the Court recognized that, "medical staff privileges embody such a valuable property interest that notice and hearing should be held prior to its termination or withdrawal, absent some extraordinary situation where a valid government or medical interest is at stake." This Court feels we are dealing with a standard which permits the application of a post-hearing, post-deprivation hearing as opposed to a pre-deprivation hearing, only in extraordinary situations where a valid government or medical interest is at stake, or, as in the *Poe* case, *Poe v. Charlotte Memorial Hospital*, 374 F. Supp. at 1302, an emergency situation exists. This Court is not convinced that the standard set forth in the subject by-law, that is, whenever action must be taken immediately in the best interest of patient care in the hospital, is any different from the standards. It says in effect there should be an emergency, to use the language of *Poe*, or some extraordinary medical interest be at stake, as in *Tidwell*.

It falls to the Court, then, to determine whether or not that standard has been met. Unfortunately, the plaintiff has given the Court no facts to dispute the findings of the committee. This contrasts with *Poe*, where in that case the Court ruled only after a full-fledged hearing involving testimony as to the propriety of the contested action from a host of thoroughly well-qualified persons, including representatives of the Mayo Clinic, and numerous others this Court does not have. In effect, this Court is reluctant to, and indeed will not, take upon itself the expertise which is obviously required if the findings of the committee are to be upset. Taken as true, these findings provide a reason for summary suspension which the Court can't find under

these circumstances to be arbitrary and capricious. Therefore, the Court feels that an emergency situation, in the words of *Poe*, or an extraordinary medical situation in the words of *Tidwell*, or a situation requiring action immediately in the best interest of patient care in the hospital, in the words of the by-law, did exist. Therefore, the plaintiff at this hearing has not shown that an emergency situation did not exist, or that he is likely to prevail on this matter on the merits. Again, and further, given the nature of the reasons for the suspension, which again have not been rebutted with specific facts by the plaintiff, the plaintiff has not shown that the public interest would not be disserved by the issuance of a temporary restraining order in this matter.

In conclusion, the Court has also, must also observe that the plaintiff has not shown that the threatened injury to the plaintiff outweighs the injury the opposing party would suffer from the issuance of a TRO. In this regard the Court, quite frankly, has looked not just at the opposing party in the sense of the hospital, but what injury to the patients involved might conceivably occur, and the threatened injury to the plaintiff under those circumstances, and by that standard it could scarcely be held to outweigh the injuries of the opposing party in the nature of patient parties, although they are not, of course, would suffer.

It is difficult to calculate what amount in the nature of a bond to protect the defendants from potential damage should it later be discovered that the TRO was issued improvidently. The Court recognizes that the plaintiff has suggested that the hospital has malpractice insurance which would cover its legal liability. The Court is confronted with the situation where doctors, specialists, persons with peculiar knowledge, which this Court does not possess, have found that immediate suspension is necessary in order to protect the best interest of the patients and in the interest of patient

care in the hospital. I'm not prepared to go behind that. If, perchance, there should be for any reason simply one injury, or one loss of life, or one unnecessary surgical procedure, or one of the any other elements contained in the report and the recommendations attached to the plaintiff's complaint, if any of these things should occur, then the Court is not prepared to say that any money bond would be sufficient, nor is the Court prepared to relegate to itself the responsibility for undertaking such a drastic change in the recommendations made by persons whose expertise has not been questioned.

The Court recognizes, of course, that the plaintiff has suggested, through counsel, that perhaps competitive situations, or competitive interests, may have motivated in some fashion these recommendations and findings. The Court is reluctant to accept that as a conclusion. I hope that the medical profession has not become, particularly in the state of Louisiana, simply, as an old law partner of mine once liked to say, the selling of cans of peas. A profession must be more than that. In any event, if that should be the circumstance, then the plaintiff can be adequately compensated in damages.

Finally, the Court would like to say this. I have ruled upon what I perceived to be the legal issue presented in this case, and, while I have found the hospital district to be on sound legal ground, at least insofar as this stage of the proceedings is concerned, I can't help but sympathize with the plaintiff, who was kept in the dark until the twelfth hour insofar as this whole proceeding is concerned. It seems to me that perhaps a little better communication would have enhanced the positions of both of the parties, and, should the plaintiff ultimately prevail in this case, minimized any potential problems or damages which the defendants may sustain. I'm not saying that it was badly handled because I don't

know enough about it. But I do think—and this is my personal view—that where professional men deal with professional men, where professional persons deal with professional persons, the punctilios of human relationships should be carefully observed. Legal rights must sometimes yield to basic human considerations. And for a professional person to have this occur, and, apparently, as he has indicated to the Court through counsel, have it strike as lightning out of the blue, is a circumstance which the Court certainly can't endorse. I'm called upon to pass upon matters of law and, on occasion, matters of fact. Thus far, I have not been called upon to pass upon matters of morals, where I would be the one probably more than any other who would be aware of casting the first stone. But I do suggest that it is perhaps a matter which in the future would bear futher consideration.

Gentlemen, it will be so ordered. The application for temporary restraining order will be denied. Thank you, counsel.

* * *

REPORTER'S CERTIFICATE

I, Delmer R. Simpson, CSR, Official Court Reporter for the United States District Court for the Eastern District of Louisiana, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the ruling of the Court had in the within-entitled and numbered case on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

s/s Delmer R. Simpson
Delmer R. Simpson, CSR
Official Court Reporter

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 87-1139
SECTION "K"

JACOB TASHER, M.D.

VERSUS

ST. TAMMANY PARISH HOSPITAL

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
FEB 10 10:51 AM '88
LORETTA G. WHYTE
CLERK
(stamp)

ORDER AND REASONS

This matter comes before the Court on motion to dismiss for failure to state a claim upon which relief can be granted or in the alternative for summary judgment filed by St. Tammany Parish Hospital, Service District No. 1, the Executive Committee of the Medical Staff of St. Tammany Parish

Hospital[1], Dr. Francis R. Rodwig, Dr. Ludwig Heintz, Dr. Ronald Lewis, Dr. Hulon Lott, Jr., Dr. Craig Parker, Dr. George Riser, Dr. B. Steele Rolston, Dr. Margaret Strong, Dr. William Terrall, Dr. James Bradford, Dr. Adrian Cairns, Dr. Robert Capitelli, Dr. Ralph Millet, Dr. Frank Robinson, and Dr. Andrew J. Kreller, III (collectively "defendants"). Having thoroughly reviewed the record, the memoranda of counsel and the law, the Court has determined that the defendants are entitled to summary judgment for reasons set forth hereinafter.

The plaintiff, Dr. Jacob Tasher ("Tasher") filed this suit under 43 U.S.C. §1981, 1983 and 1985 seeking injunctive and monetary relief arising out of his summary suspension of privileges at the defendant hospital. According to the complaint, in July 1986, an Ad Hoc Committee[2] of the Executive Committee of the hospital undertook a review of all Otolaryngology records for a one year period. Dr. Tasher, an Otolaryngologist, was aware of this review. As a result of this review, the Ad Hoc Committee concluded that the care provided by Dr. Tasher deviated significantly from the care provided by the other doctors in the study in three areas: 1.) the high rate of complications; 2.) the frequency of multiple surgical procedures in his patients, especially in children; and 3.) the routine performance of several surgical procedures which were rarely, if ever, performed by other Otolaryngologists on the medical staff. As a result,

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1. According to the complaint, the Executive Committee consisted of Dr. Millet, Dr. Lewis and Dr. Riser at the time of the suspension. Dr. Bradford, Dr. Robinson and Dr. Kreller became members after the suspension.

2. According to the complaint, the Ad Hoc Committee consisted of Dr. Rodwig, Dr. Heintz, Dr. Lewis, Dr. Lott, Dr. Parker, Dr. Rolston, Dr. Strong, Dr. Terrall, Dr. Bradford, Dr. Capitelli, and Dr. Cairns.

the Ad Hoc Committee was further charged with a comprehensive review of all of Dr. Tasher's admissions. It issued its report to the Executive Committee on February 26, 1987. Dr. Tasher alleges that he was unaware of either the concerns resulting from the general review or the existence of the subsequent study until after he received a letter from the Executive Committee suspending his privileges at the hospital on February 27, 1987. The letter also informed Dr. Tasher of his right to an appeal and hearing, which right was invoked by letter on March 6, 1987.

On March 13, 1987, the plaintiff filed this lawsuit and applied for a temporary restraining order, which application was denied. It is undisputed that he was represented by counsel at the hearings before the Executive Committee on April 21, 1987, and May 14, 1987, before withdrawing the appeal, with reservations, on May 20, 1987. Dr. Tasher was informed that his failure to proceed with the hearings would result in an abandonment of the appeal with full implications by letter dated May 22, 1987. When the hearings reconvened on June 16, 1987, counsel for the plaintiff appeared before the Executive Committee to inform them that the appeal had been withdrawn, that Dr. Tasher would not appear and that no office charts would be produced. The Executive Committee found no reason to recommend the modification or termination of the terms of the summary suspension based on what was presented to it in the hearings prior to abandonment.

In this motion, the defendants argue that their actions in summarily suspending the plaintiff complied with the bylaws of the hospital and with the requisites of due process, and that they violated no constitutionally protected right of the plaintiff. The plaintiff in opposition represents that this is "[i]n the main a case under 42 U.S.C. §1983," and

that "[w]hat occurred *before* the suspension is at issue, not what followed."

The scope of this Court's review in applying the Due Process Clause to the internal decision of the hospital authorities is limited:

> No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the Court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in the selection so that it can have confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. Courts must not attempt to take on the excutcheon of Caduceus.

Sosa v. Board of Managers of the Val Verde Memorial Hospital, 437 F.2d 173, 177 (5th Cir. 1971). Similarly, the Court

has previously determined at the hearing on the application for temporary restraining order that the Executive Committee has been given the authority by its by-laws to summarily suspend privileges "whenever action must be taken immediately in the best interest of patient care in the hospital." Inquiry is therefore limited to whether the procedures followed by the hospital, given the facts and circumstances, comported with due process and was otherwise fair and based on relevant considerations. *Jackson v. Fulton-DeKalb Hospital Authority*, 423 F.Supp. 1000 (N.D.Ga. 1976), *aff'd* 559 F.2d 1214 (5th Cir. 1977).

In general, due process requires notice and hearing prior to the termination of medical staff privileges absent some extraordinary situation where a valid government or medical interest is at stake. *Northeast Georgia Radiological Assoc. v. Tidwell*, 670 F.2d 507 (5th Cir. 1982). Again, the Court finds that the conditions set forth in the hospital by-laws present a similar, if not stricter, standard than that for summary suspension in *Tidwell*. This Court does not hesitate to conclude that the statistics relative to Dr. Tasher's practices presented to the Executive Committee and upon which the Executive Committee based its decision to summarily suspend the plaintiff's privileges clearly met this exacting standard. The plaintiff's argument that no emergency existed because he had no patients at the hospital at the time misses the mark. The risks at issue here are at least as serious as those inherent in the performance of a single intrusive diagnostic procedure on a patient without the approval and against the wishes of the primary care physician, which were recently recognized by the Fifth Circuit as sufficient to warrant a temporary suspension pending a full hearing. *Darlak v. Bobear*, 814 F.2d 1055, 1062 fn 8 (5th Cir. 1987).

In *Darlak, supra*, the Fifth Circuit indicated that the identification of the dictates of due process requires the

consideration of three factors: 1.) the private interest that will be affected by the action; 2.) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and 3.) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Darlak, supra* at 1062 citing *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976). An application of these factors to this matter clearly reveals that Dr. Tasher received all the process that was due.

As in the case of *Darlak, supra*, the suspension of staff privileges at the hospital did not prohibit the plaintiff from the ability to practice medicine, and he was given a prompt opportunity for appeal which, if successful, would result in the rescission of the suspension. Therefore, the plaintiff's private interest in not being suspended without a hearing is relatively minor when compared to the other interests at stake. As it relates to the third factor, the state has a judicially recognized legitimate interest in maintaining the quality of medical care at its hospitals. *Darlak, supra.*

As it relates to the second *Mathews, supra*, factor, while it may have been preferable to hold some sort of pre-deprivation meeting or hearing, given the comprehensiveness and results of the studies undertaken prior to the suspension, the procedures used did minimize the risk of erroneous deprivation. The plaintiff specifically refers to only one alleged error in the study concerning turbinate surgeries which he chose to dispute at the post-deprivation hearings. For purposes of this motion, the Court has assumed, specifically without finding, that that conclusion was, in fact, erroneous. After ignoring the conclusion as to turbinate surgeries, it is undisputed that the Executive Committee is left with an arsenal of conclusions from the study any

of which, standing alone, would serve as a sound and reasonable basis for their action.

While continually emphasizing the irrelevance of the truthfulness of the report's conclusions to the claim at issue here, the plaintiff alleges that a pre-deprivation hearing would have revealed the falsity of those remaining conclusions. In his opposition, the plaintiff seeks to establish the actual falsity of the conclusions by way of affidavit and response to the report, both executed after the appeal had been withdrawn, and with medical opinions devised to show that the judgment of the various Ad Hoc Committee members was "at a minimum, poor and irresponsible." Leaving aside the question of waiver[3], the presentation of any medical argument to this Court is misdirected. The plaintiff apparently has forgotten that this Court is unwilling and unable to directly or indirectly evaluate Dr. Tasher's medical practices. The wisdom of this limitation established by *Sosa, supra*, is more pronounced under circumstances where the plaintiff deliberately chooses not to present his arguments to the proper forum. For purposes of this motion, Dr. Tasher has failed to dispute either that the procedures used did not minimize the risks of erroneous deprivation, or that additional or substitute procedural safeguards would have had any significant value, or more specifically, that a pre-deprivation hearing would have resulted in continuation of his privileges. There has been no showing that the defendants were in any way unreasonable in acting as they did on the information available. On balance, the consideration of the

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3. In this regard, it should be noted that the plaintiff ultimately chose not to otherwise vindicate himself from any errors in the report by the use of the appellate process available to him. Of course, by withdrawing his appeal, he could be deemed to have waived the right he seeks herein to secure. *Richardson v. Emanuel County Hospital Authority*, 603 F.Supp. 81 (S.D.Ga. 1984); *Jackson, supra*.

Mathews, supra factors indicates that the procedures employed were sufficient under the circumstances, and there was a reasonable basis for the suspension. Compare: *Darlak, supra.*

Finally, Dr. Tasher has alleged by affidavit, that the members of the Executive Committee were so biased and prejudiced in their treatment of the plaintiff at the post-deprivation hearings as to render those hearings fundamentally unfair and flawed. The defendants have provided the Court with transcripts of those proceedings, and have specified numerous examples of fair treatment therein, contrary to the bald assertion made by the plaintiff in affidavit. Dr. Tasher himself has articulated no specific instances or indications of such bias, and the record is otherwise barren of any fact suggesting that the defendants were in any way biased by any matter not relevant to the proper consideration of Dr. Tasher's medical practices. *Woodbury v. McKinnon*, 447 F.2d 839 (5th Cir. 1971).

Finally, even assuming that a claim of racial discrimination under §1981 was properly articulated in the complaint, the plaintiff cannot withstand a motion addressing this claim with the mere statement that he is Jewish.[4] After being provided nearly a year for discovery, Dr. Tasher provides the Court with absolutely no factual basis for the claim, an inquiry which should precede the filing of any lawsuit under Fed. R. Civ. Pro. 11. Mere allegation of a minority status does not constitute a claim for racial discrimination under §1981, and does not otherwise provide immunity

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4. To the extent that the plaintiff is asking the Court to take judicial notice of the fact that "the history of Jewish medicine in St. Tammany Parish [is] suggestive of prohibited discrimination," the Court is unaware of any such history, documented or otherwise, and has been provided with no evidence as to its existence. See: Fed. R. Evid. 201.

from action which, although unfavorable, cannot be shown to have been racially motivated or otherwise constitutionally infirm. Neither has the plaintiff given any support to the more general allegations of bias and prejudice preceding the suspension. The plaintiff cannot escape summary judgment with such unsubstantiated allegations. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Similarly, assuming that the allegations of conspiracy under §1985 are properly set forth in the complaint, although the plaintiff indicates in his opposition that these claims are not race-based, the plaintiff has provided the Court with no facts which would indicate that there was any unlawful conspiracy to violate any constitutional rights.

In conclusion, the decision to summarily suspend the plaintiff's privileges without a pre-deprivation hearing was prompted by an extraordinary situation where valid government and medical interests were at stake, and otherwise met the requirements of due process. In addition, the plaintiff does not effectively dispute what the record clearly shows: that decision was based on fair procedures and by reasonable standards, applied without arbitrariness, capriciousness or constitutionally impermissable considerations, and supported with evidence at a minimum sufficient.[5]

Accordingly,

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5. In this regard, it is unclear whether the plaintiff is asserting claims for both procedural and substantive due process violations, given the plaintiff's repeated emphasis on the lack of a pre-deprivation hearing. The facts presented in this matter, as set forth hereinabove, equally support summary judgment in favor of the defendants on both claims. *Woodbury, supra.*

IT IS ORDERED that the motion to dismiss for failure to state a claim upon which relief can be granted or in the alternative for summary judgment filed by St. Tammany Parish Hospital, Service District No. 1, the Executive Committee of the Medical Staff of St. Tammany Parish Hospital, Dr. Francis R. Rodwig, Dr. Ludwig Heintz, Dr. Ronald Lewis, Dr. Hulon Lott, Jr., Dr. Craig Parker, Dr. George Riser, Dr. B. Steele Rolston, Dr. Margaret Strong, Dr. William Terrall, Dr. James Bradford, Dr. Adrian Cairns, Dr. Robert Capitelli, Dr. Ralph Millet, Dr. Frank Robinson, and Dr. Andrew J. Kreller III is hereby GRANTED.

s/s George Arceneaux, Jr.
UNITED STATES DISTRICT JUDGE

February 9, 1988
New Orleans, Louisiana

DATE OF ENTRY FEB 10 1988
(stamp)

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 87-1139
SECTION "K"

JACOB TASHER, M.D.

VERSUS

ST. TAMMANY PARISH HOSPITAL, ET AL

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
FEB 12 10:39 AM '88
LORETTA G. WHYTE
CLERK
(stamp)

JUDGMENT

The Court having issued its Order and Reasons on February 10, 1988 granting the motion of defendants to dismiss for failure to state a claim upon which relief can be granted or in the alternative for summary judgment;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, St. Tammany Parish Hospital, Service District No. 1, the Executive Committee of the Medical Staff of St. Tammany Parish Hospital, Dr. Francis R. Rodwig, Dr. Ludwig Heintz, Dr. Ronald Lewis, Dr. Hulon Lott, Jr., Dr. Craig Parker, Dr. George Riser, Dr. B. Steele Rolston, Dr. Margaret Strong, Dr. William Terrall, Dr. James Bradford, Dr. Adrian Cairns, Dr. Robert Capitelli, Dr. Ralph Millet, Dr. Frank Robinson and Dr. Andrew J. Kreller, III, and against plaintiff, Jacob Tasher, M.D., dismissing said plaintiff's complaint.

New Orleans, Louisiana, this 10th day of February, 1988.

s/s George Arceneaux, Jr.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY FEB 12 1988
(stamp)

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-3168
Summary Calendar

JACOB TASHER, M.D.,
Plaintiff-Appellant,

versus

ST. TAMMANY PARISH HOSPITAL, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana
(87-01139 K 1)

(December 1, 1988)

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

Jacob Tasher, M.D., appeals from a summary judgment denying his claim that the suspension of his privileges at St. Tammany Parish Hospital violated his constitutional right to due process. We affirm the summary judgment.

I

A.

Dr. Tasher is an ear, nose, and throat specialist. Before 1987 he had staff privileges at St. Tammany Parish Hospital in Louisiana. In July 1986, the executive committee of the hospital's medical staff appointed an ad hoc committee to review the hospital's ear, nose and throat admissions and the surgical procedures and complications with respect to those cases. When it appeared to the ad hoc committee that Dr. Tasher's cases deviated from the general ear, nose and throat cases in terms of surgical procedures performed and resulting complications, the executive committee instructed the ad hoc committee to review comprehensively all of Dr. Tasher's admissions from 1982 through 1986. After this review, the ad hoc committee prepared a report documenting their finding that Dr. Tasher's cases showed inappropriate and unnecessary admissions and surgical procedures, frequent complications, discrepancies in the records and other problems. Based on the ad hoc committee's findings, the executive committee decided on February 27, 1987, to suspend summarily Dr. Tasher's hospital privileges.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Dr. Tasher learned of the suspension in a letter dated February 27. The letter also informed him of his right to a hearing and an appeal. On March 6, Dr. Tasher exercised these rights. At that time he also received a copy of the ad hoc committee's report.

B.

According to the by-laws of the hospital's medical staff, any two members of the executive committee had the authority to summarily suspend a doctor's privileges "whenever action must be taken immediately in the best interest of patient care in the hospital." The by-laws further provided that the executive committee had the authority to recommend a modification, continuation, or termination of the terms of suspension. The by-laws set out this summary suspension procedure in addition to a suspension procedure by which a doctor would be given a chance to discuss the situation before any corrective action took place. In all suspension cases, the doctor would be entitled to a hearing before the hearing committee of the medical staff, at which the adverse recommendation of the executive committee of the medical staff could be reversed if the doctor could show that the "charges or grounds lacked any factual basis or that such basis or any action based thereon is either arbitrary, unreasonable or capricious." Finally, the doctor could then appeal the recommendation to the hospital's Board of Commissioners, which would then render a final decision.

C.

The hearing on Dr. Tasher's suspension began on April 21, when it continued for five hours. On May 14, seven more hours of the hearing took place. Dr. Tasher was represented by counsel throughout the hearing. On May 20, Dr. Tasher's

attorney informed the executive committee that Dr. Tasher was withdrawing his appeal but pursuing the lawsuit which he had filed in federal court on March 13. The executive committee responded that Dr. Tasher would have to proceed with the hearing to preserve his rights, and repeated its request for office charts. The executive committee later scheduled a date to continue the hearing. When the hearing was reconvened on June 16, Dr. Tasher was not present; his attorney, however, did attend to state that Dr. Tasher had withdrawn his appeal and would not cooperate with the committee's request to furnish his office charts.

D.

The complaint filed in federal court alleged that the St. Tammany Parish Hospital Service District, the executive committee, and individual members of the committee discriminated against Tasher and deprived him of a property interest without due process of law in violation of 42 U.S.C. §§ 1981, 1983 and 1985. The district court dismissed Dr. Tasher's actions under 42 U.S.C. § 1981 and § 1985 as failing to state claims. This dismissal is not contested on appeal. The district court also ruled on Dr. Tasher's claim under section 1983 that the defendants had violated his right to due process. The district court noted that judicial review of a hospital's actions regarding its medical staff is limited, citing *Sosa v. Board of Managers of the Val Verde Memorial Hospital*, 437 F.2d 173, 177 (5th Cir. 1971). The district court held that, although due process usually requires notice and hearing prior to a termination of medical staff privileges, the medical necessity here justified summary suspension. The district court analyzed the procedure afforded Dr. Tasher according to the factors set out in *Darlak v. Bobear*, 814 F.2d 1055, 1062 (5th Cir. 1987) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)). The district court concluded that Dr. Tasher had received all the process

that was due. Accordingly, the district court granted summary judgment in favor of the defendants.

E.

On appeal to this court Dr. Tasher argues that the granting of summary judgment was an error because there were genuine issues of material fact. Specifically, he claims that there were genuine issues regarding the existence of an emergency justifying the lack of a presuspension hearing and the overall adequacy of the process afforded under the circumstances. Dr. Tasher maintains that the process was inadequate because he was not given an opportunity to defend his practice before being suspended, he was assigned too great a burden of proof when he did receive a hearing, the judges at the hearing were biased, his interest in retaining privileges at the hospital was not minimal, and a different procedure would have allowed him to demonstrate the falsity of the grounds for the suspension.

II

A.

At the outset, we note that Dr. Tasher has misdirected the approach of his attack on the summary judgment in this case. Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c), *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552 (1986). Contrary to Dr. Tasher's arguments, there do not appear to be any material issues of fact. The actual events that serve as the basis for Dr. Tasher's complaint are undisputed. What is at issue is the legal question whether these events constituted an unconstitutional deprivation of a property interest. Thus, to succeed, Dr. Tasher's attack on the summary

judgment must demonstrate that the defendants are not entitled to judgment as a matter of law. *See Northeast Georgia Radiological Associates, P.C. v. Tidwell*, 670 F.2d 507, 510 (5th Cir. 1982).

B.

The district court was correct that the analysis of *Darlak v. Robear*, 814 F.2d 1055 (5th Cir. 1987), is applicable here. In *Darlak*, we utilized a framework for considering whether the suspension of medical privileges satisfied the constitutional requirement of due process. *Id.* at 1062-64. Specifically, we identified three factors to be considered: first, the private interest affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedure used and the probable value of additional or substitute procedural safeguards; and, third, the governmental or public interest. *Id.* at 1062 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)).

With the inquiry thus framed, we proceed to examine the specific bases of Dr. Tasher's appeal. Dr. Tasher repeatedly emphasizes that he was denied due process in that he was suspended summarily, without notice or a hearing or any knowledge on his part that his practice had been under intense scrutiny. Ultimately, however, Dr. Tasher did receive a hearing. He argues nevertheless that the executive committee had no justification for failing to give him a hearing before the suspension.

As in *Darlak*, the summary suspension and the ultimate affirmance of the suspension should be analyzed separately in terms of these three factors. 814 F.2d at 1062. First, the property interest threatened by the summary suspension was merely Dr. Tasher's interest in having medical privileges pending the hearing which he eventually received. The

district court correctly held that this interest is the same as that in *Darlak*, where we found it to be relatively minor. Second, the risk of an erroneous deprivation was minimized here by the extensive review of Dr. Tasher's cases, albeit without the benefit of his personal defense.

Dr. Tasher primarily attacks the district court's application of the third factor, the government's interest. The government's interest here is stated in the by-laws, which authorize summary suspension when "immediately in the best interest of patient care in the hospital." Dr. Tasher disputes the factual basis of the executive committee's decision that medical necessity required summary action in his case, since he had no patients in the hospital at the time. Dr. Tasher relies on *Tidwell*, where we held that notice of a hearing should precede termination or withdrawal of medical privileges in the absence of some extraordinary circumstances where a valid government or medical interest is at stake. 670 F.2d at 511 (citations omitted). In determining whether such circumstances existed here, however, we do not scrutinize the medical judgment of the hospital's staff. *Ramirez v. Ahn*, 843 F.2d 864, 869 (5th Cir. 1988); *Sosa*, 437 F.2d at 177. Our inquiry as to due process in this context is more limited. We have outlined, for example, the deferential nature of review of a hospital's staff selection:

> No court should substitute its evaluation of . . . matters [of professional competency] for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. Human lives are at stake, and the governing board must be given discretion in its selection so that it can have

> confidence in the competence and moral commitment of its staff. The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. Courts must not attempt to take on the escutcheon of Caduceus.

Sosa, 437 F.2d at 177. Our review of the medical necessity in the instant case is similarly limited. Since the executive committee's decision has not been successfully challenged as biased or based on irrelevant considerations, we must accept its evaluation of the medical interest in suspending Dr. Tasher's hospital privileges. Since that medical interest far outweighs both Dr. Tasher's interest in having privileges pending a hearing and the marginal risk of an erroneous deprivation of Dr. Tasher's interest by suspending his privileges without a prior hearing, we hold that the summary suspension of Dr. Tasher's privileges did not violate his right to due process.

C.

We turn next to the executive committee's permanent affirmation of the summary suspension. Our review of the overall process afforded Dr. Tasher is impeded by Dr. Tasher's eventual refusal to cooperate. We nevertheless address

his attack on the hearing which the executive committee conducted. Dr. Tasher argues that he was deprived of due process because at the hearing he carried the burden of showing that the grounds for the summary suspension "lacked any factual basis or that such basis or any action based thereon is either arbitrary, unreasonable or capricious."

We again evaluate this procedure in terms of the three factors identified in *Darlak*. First, Dr. Tasher's interest in having privileges at the hospital are obviously greater when the deprivation threatens to be permanent. On the other hand, the public or governmental interest is similarly expanded when the time frame is unlimited. Finally, at the heart of Dr. Tasher's challenge is his claim that this procedure carries too great a risk of erroneous deprivation, since the burden is so difficult to satisfy. Keeping in mind that our review of judgments of medical necessity is limited, we cannot agree with Dr. Tasher. The procedure does provide him the opportunity to be heard and to present his case thoroughly. The role of the federal courts is not to guarantee that each governmental determination affecting property rights is perfectly error-free. *Ramirez*, 843 F.2d at 869. Given the interests at stake in this case, the burden of proof placed on Dr. Tasher at his hearing does not violate the Constitution.

Dr. Tasher also maintains that his hearing was unfair because the arbiters of the hearing were already defendants in this lawsuit. Clearly Dr. Tasher cannot file a lawsuit saying that the executive committee's procedure is unfair precisely because the committee and its members are defendants in that very lawsuit. This reasoning is circular and, consequently, the argument is without merit.

III

Because the executive committee's procedure satisfied Dr. Tasher's right to due process, the judgment of the district court is

AFFIRMED.

APPENDIX E

IN THE
UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-3168

JACOB TASHER, M.D.,
Plaintiff-Appellant

versus

ST. TAMMANY PARISH HOSPITAL, ET AL.,
Defendant-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
Civil Action No. 87-1139, Section "K"
Honorable George Arceneaux, Jr., Presiding

PETITION FOR PANEL REHEARING

U.S. COURT OF APPEALS
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NEW ORLEANS, LA.
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PETITION FOR PANEL REHEARING

ISSUES FOR RECONSIDERATION OR SPECIFICATION OF ERROR

I. DID THE PANEL OPINION CONSIDER THE *LOUDERMILL, DARLAK* AND *RAMIREZ* REQUIREMENT OF SOME FORM OF PRESUSPENSION HEARING?

II. DOES THE PANEL'S DEFERENCE TO MEDICAL OPINION IN MATTERS OF STAFF PRIVILEGES AMOUNT TO LACK OF JUDICIAL REVIEW IN LIGHT OF THE SUPREME COURT'S HOLDING IN *PATRICK V. BURGET*, 108 S.CT. 1658 (1988)?

STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

Dr. Jacob Tasher was summarily suspended from the staff of a public hospital without a presuspension hearing after an ad hoc committee had studied his admissions for many months. The panel opinion concluded that no presuspension hearing was required where a claimed emergency was involved, and substantial post suspension hearing processes were in place. A balancing of social vs. private interests dictated that Dr. Tasher received ample process.

The Supreme Court and prior opinions of the Fifth Circuit recognize the requirement of some form of presuspension hearing. This argument is grounded in the Supreme Court due process cases of *Brock*, *Loudermill* and *Bobbie v. Connecticut* and the Fifth Circuit opinions in *Tidwell*, *Darlak* and *Ramirez*. The panel opinion in this case abandoned any requirement of a hearing *before* suspension presumably on the grounds of emergency, a finding never made by the committee suspending the doctor.

The panel held that emergency as a condition precedent to dispensing with a presuspension hearing is not a matter for a court to examine because of the great deference which the court accords conclusions of physicians with respect to matters of medical staffing.

This deference leads to a refusal to examine the condition precedent to dispensing with a hearing *before* suspension. With respect to the panel, this deference amounts to a failure to provide proper judicial review under the Supreme Court thinking in *Patrick v. Burget*.

The panel should reconsider its opinion in view of its earlier precedent and *Loudermill* and reconsider its deference based on *Sosa v. Board of Managers* in light of the Supreme Court's thinking in *Patrick v. Burget*, 108 S.Ct. 1658 (1988).

ARGUMENT

I. THE PANEL HAS ABANDONED THE *LOUDERMILL* AND FIFTH CIRCUIT REQUIREMENT OF SOME FORM OF PRESUSPENSION HEARING.

It is respectfully submitted that the panel thinking derives from the 1976 Supreme Court of the United States case of *Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed2d 18 (1976). Since that time the Supreme Court decided *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985) and *Brock v. Roadway Express, Inc.*, 107 S.Ct. 1740 (1987). *Loudermill* requires "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." *Cleveland Board of Education v. Loudermill, supra* at 1747. Citing *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed2d 1113 (1971). Subsequent to *Boddie* and *Loudermill*, The Supreme Court decided *Brock v. Roadway Express, Inc.*,

107 S.Ct. 1740 (1987) wherein again the emphasis was on a due process requirement of a pretermination hearing of some sort. With all due respect to the panel, no where in its opinion does it actually engage the issue of the requirement of a hearing *before* as set forth in the post *Matthews* Supreme Court jurisprudence as found in *Loudermill* and *Brock*. The panel opinion no where mentions *Loudermill, Brock* or *Boddie*. Instead, the Court proceeds on an interest analysis rooted in *Matthews v. Eldridge*, 424 U.S. 319, 334-335 (1976). Interest analysis alone cannot dispense with the procedural requirement of hearing *before* as set forth in *Loudermill, Boddie* and *Brock*.

Furthermore, this Court in reliance upon the *Loudermill* line of cases has recognized the requirement of some form of presuspension hearing albeit very slight. Both *Darlak v. Bobear*, 814 F.2d 1055 (5th Cir. 1987) and *Ramirez v. Ahn*, 843 F.2d 864 recognized the requirement of some form of presuspension hearing. In its analysis of *Loudermill*, in *Darlak* noted the requirement of a hearing *before* deprivation of a significant property interest. *Darlak, supra* at 1062. After noting that Dr. Darlak did have some form of hearing and an opportunity to defend himself before suspension the *Darlak* court then discussed *Matthews v. Eldridge*, interest analysis and the flexibility of due process requirements. The Fifth Circuit opinion in *Darlak* wherein the flexibility and the balancing process is made a requirement derives from a quotation from *Matthews v. Eldridge, supra* at 96 S.Ct. 902-903. *Matthews v. Eldridge* was decided in 1976 and *Loudermill* in 1985 and *Loudermill* stated in very emphatic terms that there must be an opportunity for a hearing–*before* a privation of any significant property interest.

In melding the *Loudermill* and *Matthews v. Eldridge* thinking, the Fifth Circuit retained the requirement of some

form of hearing before suspension. Dr. Darlak argued that the regulations did not require such a hearing. The court instead preferred to look at what actually happened; there was a meeting between Dr. Darlak and the people who suspended him prior to the suspension. See, *Darlak, supra* at 1062 fn. 8, 1057 and 1063. Thus, the *Darlak* court preserved the *Loudermill* requirement of some form of hearing–*before*.

Commencing on page 7 of its opinion in this case, the panel has concentrated on the *Darlak* interest analysis. The panel opinion in this case also relied heavily on *Ramirez v. Ahn*, 843 F.2d 864 (5th Cir. 1988). In that matter, the court, through Judge Jolly, recognized the *Loudermill* requirement that "any deprivation of life, liberty or property 'be preceded by notice and an opportunity for hearing appropriate to the nature of the case'. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed2d 494 (1985) (quoting *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656-57, 94 L.Ed 865 (1950))". *Ramirez v. Ahn*, 843 F.2d 864, 867 (5th Cir. 1988). The court in *Ramirez* noted that Dr. Ramirez was given advance written notice of the initial hearings against him. *Ramirez, supra* at 866-67, 868. There were actually three hearings in *Ramirez*, one before the suspension and two following. In every case, Dr. Ramirez was advised beforehand and given some form of opportunity to participate. In Dr. Tasher's case the panel has overlooked the *Loudermill* requirement of some form of hearing before suspension of privileges. The panel has not performed the full analysis as required under its *Darlak* and *Ramirez* jurisprudence which is a bonding of the *Loudermill* requirement of a hearing *before* followed by a *Matthews* type of interest analysis.

In *Northeast Georgia Radiological Association v. Tidwell*, 670 F.2d 507, 511 (5th Cir. 1982), this court affirmed the requirement of prior hearing "absent some extraordinary situation." In Dr. Tasher's case the panel defers to medical judgment of the suspending physicians without itself examining to determine whether an "extraordinary situation" existed.

II. THE PANEL'S DEFERENCE BASED UPON *SOSA* FAILS TO ACCORD DR. TASHER APPROPRIATE JUDICIAL REVIEW UNDER THE THINKING OF THE SUPREME COURT IN *PATRICK V. BURGET*.

In the panel opinion in the Tasher case, the court indicates great deference to the judgment of doctors concerning medical matters. After reviewing the opinion with its reliance upon *Sosa v. Board of Managers of the Val Verde Memorial Hospital*, 437 F.2d 173, 177 (5th Cir. 1971), the question can be legitimately asked, "Can doctors ever be questioned concerning their judgment about medical staff matters?" In the case *sub judice* there was no declaration by the Executive Committee or the Ad Hoc Committee or any other committee that an emergency existed. The record is devoid of such a declaration. Yet, summary suspension was put into effect. Dr. Tasher's claim is a claim of constitutional proportions. A substantial property interest of his is involved. Not only were his privileges lost at St. Tammany Hospital, but his reputation was severly damaged and erroded. To use deference to medical judgment as a means of denying a claim of constitutional proportions seems indefensible.

The Supreme Court at last term became involved in a matter wherein the same issues were important. The issue was not civil rights or the Civil Rights Act, but the Sherman Anti-Trust Act. In that case a doctor's privileges were suspended by his alleged competitors and among the arguments

made was that of deference to the judgment of a peer review group. In *Patrick v. Burget*, 108 S.Ct. 1658 (1988), an Oregon physician in independent practice had professional difficulties in his dealings with other physicians in a small community hospital. A group of physicians organized in a clinic eventually initiated in and participated in a peer review proceeding, where the ultimate effect was to deprive Dr. Patrick of hospital privileges at the community's only hospital. The termination of staff privileges was on the grounds that Dr. Patrick's care of his patients was below hospital standards.

The aggrieved physician brought suit under the Sherman Act. The defendant doctors claimed that their action was protected because it was state action and therefore exempt from scrutiny in federal anti-trust actions.

In order to pass upon this defense, the Supreme Court examined the argument which was the same as that put forward by *Sosa* to the effect that courts do not review the judgment of physicians in matters of hospital staff selection. The court stated:

> "Moreover, the Oregon courts have indicated that even if they were to provide judicial review of the hospital peer-review proceedings, the review would be of a very limited nature. The Oregon Supreme Court, in its most recent decision addressing this matter, stated that a court "should (not) decide the merits of plaintiff's dismissal" and that "(i)t would be unwise for a court to do more than to make sure that some sort of reasonable procedure was afforded and that there was evidence from which it could be found that plaintiff's conduct posed a threat to patient

> care." *Straube v. Emanuel Lutheran Charity Board, supra*, 287 Or., at 384, 600 P.2d, at 386. This kind of review would fail to satisfy the state action doctrine's requirement of active supervision. Under the standard suggested by the Oregon Supreme Court, a state court would not review the merits of a privilege termination decision to determine whether it accorded with state regulatory policy. Such constricted review does not convert the action of a private party in terminating a physician's privileges into the action of the State for purposes of the state action doctrine."
>
> *Patrick v. Burget, supra*, at 1665.

The constricted review which the *Sosa* policy dictates is obviously not judicial review in the judgment of the Supreme Court. It fails as a judicial act. The refusal of the panel to venture upon a determination of whether or not a genuine emergency existed which would nullify the requirement of a presuspension hearing is not judicial review. If it would not amount to review sufficient to justify state action in a state court, it certainly could not be considered adequate review.

The *Sosa* rule of constricted review or "rule of deference" did not prevent a jury from examining the judgment calls of a doctor in an anti-trust challenge. The jury heard the evidence about whether the doctors were justified in suspending Dr. Patrick and determined that they were not; anti-trust violations had in fact occurred. By analogy, what is presented here is a challenge under the Civil Rights Act as opposed to the Sherman Act and the constricted review standard has been utilized by the panel to prohibit the inquiry by a jury

into whether or not an emergency existed so as to dispense with the requirement of a prior hearing. The conduct of the doctor defendants in this case could be examined in a Sherman Anti-Trust Act challenge on the basis of *Patrick v. Burget, supra*. It seems unique that the rule of the *Sosa* case would prohibit such an inquiry where a claim of constitutional right was at issue.

CONCLUSION

The opinion of the panel in this case has followed only a balancing interest approach. It has overlooked the Supreme Court requirement enunciated in the *Loudermill, Boddie* and *Brock* triad of some form of presuspension hearing. The jurisprudence of this court has recognized the need for some form of presuspension hearing in both *Darlak* and *Ramirez*. The panel should reconsider its thinking in light of the fact that its Tasher opinion fails to comport with the thinking of the panels in *Darlak* and *Ramirez*.

Finally, the constricted review founded upon the *Sosa* case is in a very real sense an abstention from the exercise of proper judicial power. In this case the jury should have the right to determine whether or not the defendants were justified in not according Dr. Tasher a hearing *before* suspending him.

For the foregoing reasons, Jacob Tasher, M.D. requests a rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petition for Panel Hearing has been served upon Mr. Lucas Giordano, STASSI & RAUSCH, 3rd Floor, 810 Union Street, New Orleans, Louisiana 70112, Mr. Peter Dazzio, WATSON, BLANCHE, WILSON & POSNER, 505 North Boulevard, P. O. Drawer 2995, Baton Rouge, Louisiana 70821, Mr. Stewart Niles, JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE, Place St. Charles, 201 St. Charles Avenue, New Orleans, Louisiana 70170 and Mr. Lawrence E. Larmann, HAILEY, McNAMARA, HALL, LARMANN & PAPALE, P. O. Box 8288, Metairie, Louisiana 70011-8288 by depositing a copy of same in the United States mail this 27th day of December, 1988.

s/s William A. Porteous, III
WILLIAM A. PORTEOUS, III

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-3168

JACOB TASHER, M.D.,
Plaintiff-Appellant

versus

ST. TAMMANY PARISH HOSPITAL, ET AL.,
Defendants-Appellees.

U.S. COURT OF APPEALS
F I L E D
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GILBERT F. GANUCHEAU
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Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

Before CLARK, Chief Judge, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

s/s E. Grady Jolly
United States Circuit Judge

CLERK'S NOTE:
FRAP AND LOCAL
RULES 41 FOR STAY OF THE MANDATE
(stamp)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Appendix has been served upon Mr. Lucas Giordano, STASSI, RAUSCH & GIORDANO, 1150 Lakeway Two, 3850 N. Causeway Boulevard, Metairie, Louisiana 70002, Mr. Peter Dazzio, WATSON, BLANCHE, WILSON & POSNER, 505 North Boulevard, Post Office Drawer 2995, Baton Rouge, Louisiana 70821, Mr. Stewart Niles, JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE, Place St. Charles, 201 St. Charles Avenue, New Orleans, Louisiana 70170 and Mr. Lawrence E. Larmann, HAILEY, McNAMARA, HALL, LARMANN & PAPALE, Post Office Box 8288, Metairie, Louisiana 70011-8288 by depositing a copy of same in the United States mail this 26th day of April, 1989.

William A. Porteous III

WILLIAM A. PORTEOUS, III